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CHARLES E. WYZANSKI, JR.

Supreme Court of the United States

OCTOBER TERM—1945

No. [redacted] 57 A

EASTERN TRANSPORTATION COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE APPELLANT.

EDWARD A. HARNETT, JR.,

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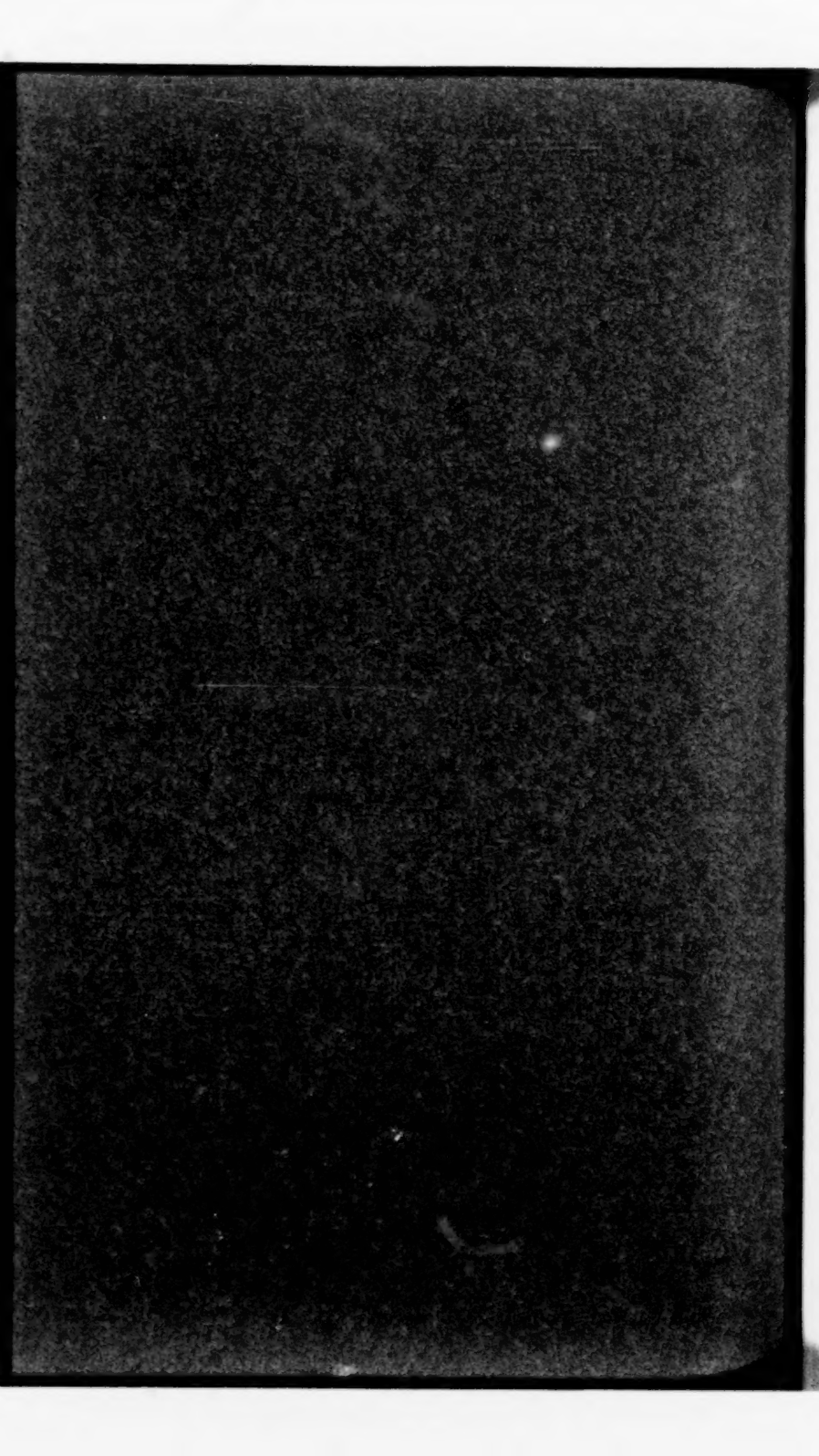

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SUPREME COURT OF THE UNITED STATES.

EASTERN TRANSPORTATION COMPANY, Appellant, *vs.* UNITED STATES OF AMERICA, Respondent.	October Term, 1925. No. 351

BRIEF ON BEHALF OF APPELLANT.

This is an appeal on a question of jurisdiction under the Suits in Admiralty Act of March 9, 1920, taken under the provisions of Section 238 of the Judicial Code on March 20, 1925, before the Act of February 13, 1925, became effective.

The libel in the case was originally brought both against the United States and against the Seaboard Transportation Company.

All proceedings against the Seaboard Transportation Company have been dismissed and, consequently, the case is at an end so far as that company is concerned. *Record*, p. 12.

The libel alleges that the Eastern Transportation Company was the owner of the barge *J. H. Winstead*, and that the United States was the owner of the steamship *Snug Harbor*. *Libel Articles 1 and 2, Record*, p. 1.

On the 15th of August, 1920, the steamship *Snug Harbor* whilst on a voyage between Baltimore, Maryland, and Portland, Maine, came into collision with a barge in tow of the Tug *Covington* owned by the Seaboard Transportation Company.

As a result of this collision the *Snug Harbor* sank at a point about four and a half miles east by north of Montauk Point Light in a frequented channel within the harbor and inland waters of the United States.

The wreck of the *Snug Harbor* was not marked by a buoy or beacon by day or lighted by lantern by night as required by law and was not removed by the United States, and up to the time of the loss of the *Winstead* notice of the presence of the *Snug Harbor* in the said fairway had not been given to the libelant nor had any notice been generally published advising mariners navigating the waters in which the *Snug Harbor* had sunk of her presence there as a wreck.

On the 14th of September, 1920, the barge *Winstead*, loaded with a full cargo of coal, in tow of the tug *Barrallton*, on a voyage from Norfolk, Virginia, to Fall River, Massachusetts, came into contact with the wreck of the *Snug Harbor*, and as a result was sunk and with its cargo became a total loss. *Libel Article 7, Record*, p. 2.

It is further alleged in the libel that the collision in which the steamship *Snug Harbor* was sunk was caused or contributed to by the negligence of the *Snug Harbor*.

It is also alleged that when the barge *Winstead* collided with the wreck of the *Snug Harbor* and, as a result of the collision, became with her cargo a total loss, she was being navigated in a proper and skillful manner, that the presence of the *Snug Harbor* was not apparent to those in charge of the barge and that the contact with the wreck and the consequent loss of the barge *Winstead* were due to the unlawful presence of the wreck in a frequented channel within the harbor and inland waters. *Libel Article 9, Record*, p. 3.

It is further alleged in the libel that, by reason of the premises, the United States is liable for the sinking of

the *Winstead* due to the failure properly to mark the wreck of the *Snug Harbor* or to have it destroyed prior to September 14, 1920. *Libel Article 10, Record,* p. 3.

The Government filed a suggestion of want of jurisdiction and made a motion to dismiss the libel on the following grounds:

1. That the cause of action related to a failure on the part of the United States to perform a purely governmental function and did not constitute a basis of any liability for which the United States would be suable.

2. That the *Snug Harbor* at the time of the collision was not a merchant vessel and that, consequently, the libel did not come within the jurisdiction of the Suits in Admiralty Act of March 9, 1920.

3. That there is not any right of suit *in personam* under the said Suits in Admiralty Act, and inasmuch as the *Snug Harbor* was lost those damaged by striking her wreck were without any remedy.

4. Finally, that the Wreck Act of March 3, 1899, making it the duty of the owner of any vessel or craft wrecked or sunk in a navigable channel immediately to mark it with a buoy or beacon by day and a lighted lantern at night has no application to the United States of America, imposes no duty on them and creates no liability for which they are suable. *Suggestion, Record,* pp. 4, 5.

This motion to dismiss was very fully argued before Judge Groner and on September 30, 1922, after holding the matter under consideration, he rendered a decision in which he sustained the libel and denied the motion to dismiss.

Opinion, Record, pp. 6-8. *The Snug Harbor,* 283 Fed. 1015.

Some time afterward Judge Groner ordered a reargument, and reconsidered the case and on January 30, 1925, he entered a decree dismissing the libel on the ground that at the time the *Snug Harbor* was sunk she had become a total loss, and that consequently the Court was without jurisdiction. *Judgment and Order dismissing Libel, Record,* p. 9.

When Judge Groner's original opinion sustaining the libel is read it will be seen that he had in that decision really reserved the question as to whether the *Snug Harbor* was really a total loss and its effect on the jurisdiction to be determined on the facts at the trial.

Consequently, his short decree entered on January 30, 1925 reversing his previous ruling and finally dismissing the libel, was in effect a holding that there could not be a libel *in personam* against the United States under the Suits in Admiralty Act when, owing to the loss of the vessel, a proceeding *in rem* could not have been maintained.

The appellant contends that this construction of the Suits in Admiralty Act is erroneous.

The usual certificate that the decision was based on a question of jurisdiction only was given by Judge Groner. The petition for appeal was allowed. *Record,* pp. 9, 10.

Appropriate assignments of error were filed, *Record,* pp. 10-11, assigning error on the ground that the Court held it was without jurisdiction against the United States under the circumstances set forth in the libel, and in that the Court dismissed the libel on that ground.

The clean cut question, therefore, is raised in this

Court—it is believed for the first time*—whether under the Suits in Admiralty Act of Mar. 9, 1920 the United States can be held liable in a proceeding in admiralty *in personam* in a case in which a private owner would have been held liable, although by reason of the loss of the vessel which caused the damage a proceeding *in rem* would not have been possible.

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* The following are the cases in which the Suits In Admiralty Act has come before this Court:

The Western Maid (January 3, 1922), 257 U. S. 419, held that a vessel, while engaged in the *public* service, was not liable under the Act.

Blamberg Bros. vs. *United States* (January 2, 1923), 260 U. S. 452, held that when the United States was not liable personally under the Maritime Law and when the vessel which was the cause of the liability was not itself within the United States, no action could be maintained, because an action *in personam* could not be maintained if the suit were against a private owner, and no action could be maintained *in rem* against a vessel outside of the jurisdiction.

James Shewan & Sons, Inc., vs. *United States* (November 17, 1924), 266 U. S. 108, held that the mere fact that a vessel was laid up and out of use when an action was begun did not prevent its maintenance, provided that the vessel had been used as a merchant vessel when the cause of action against the United States arose.

Nahmeh vs. *United States* (March 2, 1925), 267 U. S. 122, held that when a vessel was within the United States, a proceeding *in rem* could be maintained either in the district where the vessel was lying, or, under the Act, in the district where the libelant resided; moreover, that the Suits In Admiralty Act should be liberally construed.

Doullut & Williams Co., Inc., vs. *United States* (April 13, 1925), 268 U. S. 33, followed *The Blackheath*, 195 U. S. 361, and *The Raithmoor*, 241 U. S. 166, and held that an action could be maintained against the United States under the Suits In Admiralty Act for injuries done to piling standing in the Mississippi River by vessels owned by the United States and used as merchant vessels.

The legislative history of the Act is set forth in full as Appendices I and II hereof. The Act in its final form is given as Appendix III.

FIRST POINT.

THE DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA HAD JURISDICTION OF THIS PROCEEDING AGAINST THE UNITED STATES BECAUSE UNDER THE SUITS IN ADMIRALTY ACT OF MARCH 9, 1920, THE UNITED STATES CONSENTED TO BE SUED IN ANY PROCEEDING IN ADMIRALTY IN WHICH SUCH A PROCEEDING COULD HAVE BEEN MAINTAINED AGAINST A PRIVATE SHIPOWNER.

I. When the Shipping Board was created by the Shipping Act of 1916, and the United States decided to go into the business of operating merchant ships, it was provided by Congress that the ordinary liabilities of private merchant vessels should apply to such Government owned merchant vessels.

In Section 9 of the Shipping Act, 1916, it is provided:

> "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

In the case of *The Lake Monroe,* 250 U. S. 246, it was held that this section entitled "a private person damaged by the act of a Government vessel to proceed against that vessel *in rem* provided she was employed at the time of injury as a merchant vessel."

The provision above quoted of Section 9 of the Shipping Act, 1916, was re-enacted in Section 18 of the Merchant Marine Act, 1920.

By these Acts, therefore, the liabilities of Government owned merchant vessels were the same as those of privately owned merchant vessels.

II. After these Acts had been in operation for some time and after the decision of *The Lake Monroe*, 250 U. S. 246, it was realized that it might be a serious inconvenience to the Government to have its vessels delayed by arrests and subject to the requirement that they give bonds as a condition of their release.

This situation resulted in the passage of The Suits in Admiralty Act of March 9, 1920.

This Act made Government owned vessels when operated as merchant vessels or tugs responsible on the same basis as if they were being operated by a private owner.

The Suits in Admiralty Act abolished the right to arrest Government vessels by proceedings *in rem* and allowed "*a proceeding in admiralty*" to be maintained against the United States by libel *in personam*, with the proviso that if the libelant wished so to elect it might proceed in this libel against the Government on the same principle as if the libel had been a libel *in rem*, and the ship had been arrested.

But such election was not to preclude the libelant in any proper case from seeking relief *in personam* in the same suit.

The relevant provisions of the Suits in Admiralty Act are as follows (italics ours):

> "Sec. 1. That no vessel owned by the United States or by any corporation in which the United

States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, that this Act shall not apply to the Panama Railroad Company.

Sec. 2. That in cases where if such vessel were privately owner or operated, or if such cargo were privately owned and possessed, *a proceeding in admiralty* could be maintained at the time of the commencement of the action herein provided for, *a libel in personam may be brought against the United States* or against such corporation, as the case may be, *provided that such vessel is employed as a merchant vessel* or is a tug boat operated by such corporation. • • •

Sec. 3. *That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties.* • • • Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. • • • *If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned or possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit.*

Sec. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels."

It is perfectly clear from this language

1. That what was implicit in the Shipping Act of 1916 and the Merchant Marine Act of 1920, as to the legal status of the Government and of Government owned or operated vessels whilst employed as merchant vessels was made explicit by the Suits in Admiralty Act, and

2. That under the Act "*proceedings in Admiralty*" were to be maintainable against the United States when its liability arose out of the operation of one of its vessels as a merchant vessel, and

3. That by such proceedings all liabilities imposed by law on private persons similarly engaged could be claimed against the United States with correlative rights in the United States to avail itself of all defenses and limitations of liability available under Admiralty Law and Practice to a private owner.

It may perhaps be appropriately emphasized here that the condition of the right to sue the United States is that a "*proceeding in admiralty*" could be maintained in a similar suit against a *private person.*

There is not any limitation on the phrase "*proceeding in admiralty.*"

It is not limited to a proceeding in admiralty *in rem* which would mean a case where a maritime lien would have

been created against the vessel in question if she were held responsible for the tort or breach of contract which might be involved in the case.

It may be appropriate, therefore, here to consider what a "*proceeding in admiralty*" is.

The rules of practice in admiralty promulgated by this Court on December 6, 1920, to take effect on March 7, 1921, deal in the first ten sections with "*Proceedings in Admiralty*".

The first rule deals with conditions precedent to the issuance of any process in Admiralty.

The second rule deals with process in suits *in personam.*

The fifth rule deals with bonds in attachment suits *in personam.*

The eighth rule deals with the reduction of appeal bonds or stipulations and new sureties in suits either *in rem* or *in personam.*

The ninth rule deals with monitions to third parties in suits *in rem* against vessels.

The tenth rule deals with process in suits *in rem.*

Rules thirteen to eighteen deal with the joinder in one libel of suits *in rem* against the appropriate *res,* and suits *in personam* against the party sought to be held personally liable.

Thus the rules of this Court promulgated in pursuance of the statutory authority given to it under the provisions of the Act of August 23, 1842, and which consequently have the force of law recognize throughout that a *proceeding in admiralty* is not limited solely to proceedings *in rem.*

The Admiralty Rules above referred to have been

printed for the convenience of the Court as Appendix V hereof.

Many examples of recent *proceedings in admiralty* which have come before this Court of both kinds are the following:

Proceedings *in personam*:

Watts, Watts & Co., Ltd. v. *Unione Austriaca, etc.*, 248 U. S. 9;
Texas Company v. *Hogarth Shipping Co., Ltd.*, 256 U. S. 619;
Standard Oil Co., as Owner of S. S. *Llama* v. *United States*, 267 U. S. 76;
Littlejohn & Co. v. *United States*, Decided Mar. 1, 1926.

Proceedings *in rem*:

The Kronprinzessen Cecilie, 244 U. S. 12;
Piedmont & Georges Creek Coal Co. v. *Standard Fisheries Co., Claimant of various Fishing Steamers*, 254 U. S. 1;
The Barnstable, 181 U. S. 464;
The Folmina, 212 U. S. 354;
The Gul Djemal, 264 U. S. 90.

Another recent litigation in this Court in which in a series of five cases involving the same vessels, some were *in rem* and some *in personam*, is the case of *The Murmugao*, 264 U. S. 105.

In addition to these cases, each of a distinct kind, are the limitation of liability cases which are often stated to involve both *in rem* and *in personam* proceedings although

perhaps they are not properly to be included in either category.

Recent cases of this kind are:

Standard Oil Co. v. *Southern Pacific Co.*, 268 U. S. 146.

East River Towing Co., Inc., Owner of Tug Edwards, 266 U. S. 355.

We have not sought to make an exhaustive list of these cases but all of them are *proceedings in admiralty* which have been recently before this Court and which illustrate as do the rules of this Court beyond peradventure the fact that the expression a "*proceeding in admiralty*" is not limited to a proceeding *in rem*.

That a proceeding *in rem* is advantageous to a libelant in certain cases is, of course, quite obvious, for there are many cases in which the personified ship herself is held liable under our law when her owner would not be liable.

Cases of this kind, for example, are the celebrated cases of:

The China, 7 Wall. 53 (1868) where a vessel was held liable for the negligence of a compulsory pilot.

The Brig Malek Adhel, 2 How. 210 (1844) where a vessel was held liable for the acts of a master who had turned pirate.

In *The China*, 7 Wall. 53, the owners would not have been held in an action *in personam*, for damages due to the fault of a compulsory pilot, as was shown by the subsequent case of

Homer Ramsdell v. *Compagnie Generale Transatlantique*, 182 U. S. 406, 414.

The Barnstable, 181 U. S. 464, was a case where a steamer vessel under a bare boat or demise charter in which the charterers employed and paid the crew was held liable *in rem* for a collision although her owners, of course, could not have been held personally liable.

Workman v. *The Mayor,* 179 U. S. 552, is also a very interesting case in connection with the situation in the instant case because it was there held that while, of course, the Municipal owner of a fireboat could not on grounds of public policy have his vessel arrested *in rem* for a collision he would nevertheless be liable *in personam* for negligent navigation of the fireboat.

The cases just discussed were proceedings *in rem* and show why the option was given to the libelants in the Suits in Admiralty Act to have their libels maintained according to the principles of suits *in rem.* It conformed the situation to that of private litigants.

Of course when the proceeding can *only* be maintained *in rem* if the vessel were privately owned, and the owner of the vessel would not be liable *in personam,* then you have a situation such as existed in the case of *Blamberg Bros.* v. *United States,* 260 U. S. 452, where the United States owned a barge and chartered her under a bare boat or demise charter, under which the charterer was the operator, and the vessel was not within our jurisdiction.

In that case, if the vessel had been owned privately and been within the United States, she would have been sued *in rem* as in the case of *The Barnstable,* and would have been held liable *in rem* when there was not any possible claim against her owner *in personam.* What was really decided in the Blamberg case was, that the Suits in Admiralty Act did not authorize a suit *in personam* against the

United States as a substitute for a libel *in rem* against a vessel, when

(1) The vessel was not available in a port of the United States and subject to the process of our Courts, because in such a case the vessel of a private owner could not have been arrested; and

(2) When the private owner would not have been liable to personal suit.

III. The Suits in Admiralty Act constituted, therefore, a consent on the part of the United States to be sued in any admiralty proceeding in which a private owner would be liable provided the vessel through which the liability arose was operated as a merchant vessel.

This is a recognition of the feeling frequently expressed that when the Government goes into business it should assume the same liabilities as others.

This has been recognized and referred to in the old as well as in the recent cases in which the courts have acted upon claims for immunity on behalf of government owned ships. Perhaps the rule is nowhere better stated than in *The Charkieh,* L. R. 4 A. & E. 59, which though subsequently reversed remains the statement oftenest referred to as the proper and enlightened rule. It was there held that if a Sovereign assumes the character of a trader, and sends a vessel belonging to him to this country to trade here, he must be considered to have waived any privilege which might otherwise attach to the vessel as the property of a Sovereign.

In the case of *Walton* v. *United States,* 24 Court of Claims, 372, 379, Senator Hoar is quoted as having said:

"* * * we are of opinion that there are two classes of cases where sound public policy requires the United States and all other sovereign governments to hold themselves responsible for injuries occasioned by the negligence of their agents. One is where the Government, through its agents, manages or controls property from which it receives a benefit or profit. * * *

"Another class of cases where this responsibility is recognized is where the Government is using or managing property through its agents under circumstances where these agents mingle on terms of equality with the general mass of citizens, and where the security of the citizens requires that the same obligation shall rest upon them and that it shall be enforced by similar responsibility as in the case of private persons. Congress has always recognized the obligation of the Government for injuries occasioned by the fault of the officers of its naval and other vessels in maritime collisions."

In the opinion in *St. Louis* v. *United States,* 33 Court of Claims, 251, 269, the Court says:

"Cases of injury occasioned by Government agents on the water are peculiarly within the rule of responsibility."

The Suits in Admiralty Act, therefore, gave statutory sanction to a feeling that has been constantly growing that the doctrine of governmental immunity is not a doctrine which is in consonance with modern ideas.

Since Judge Groner made his first decision in this case there have been a number of decisions in the Lower Courts which sustain the libelant's position that an *in personam action* will lie against the United States under the Suits in

Admiralty Act even if an *in rem* action which must be founded on a maritime lien would not be maintainable if the vessel in question were privately owned.

These cases and the dates of their decisions are as follows:

In *Middleton & Co.* v. *United States* (D. C. E. D., So. Car., May 19, 1921), 273 Fed. 199; 286 Fed. 548, a suit was brought for damages for delay in the transportation of cargo. The vessel was outside of the district where suit was brought. In the first action, Smith, D. J., permitted the libel to be amended to state a cause of action *in personam*. In the second action recovery was had against the United States on this libel.

An appeal on the merits was taken to the Circuit Court of Appeals for the Fourth Circuit, 3 Fed. (2d) 384. The Government did not attempt to appeal on the jurisdictional question.

The Elmac (D. C. S. D., N. Y., June 26, 1922), 285 Fed. 665, was a suit *in personam* for damages for the breach of a charter party, in that the vessel failed to be ready to receive cargo in accordance with the charter. In this case no liability *in rem* could arise because the libelant's merchandise was never placed aboard the vessel and the charter was cancelled by the libelant pursuant to its terms because the ship was not in readiness to receive it. It was held by Learned Hand, D. J., that such a suit would lie, and in order to permit such a suit to lie he allowed the libel to be amended to show the residence of the libelant.

In *Agros Corporation* v. *United States* (Dist. Ct. S. D., N. Y., October 11, 1922), 8 Fed. (2d) 84, the question of jurisdiction came up on respondent's exceptions to a libel

in the Admiralty. The case raises only one question: Whether under the Act of March 9, 1920 (Comp. St. Ann. Supp. 1923, Sections 1251¼-1251¼L), a libelant may sue the United States *in personam* upon a maritime claim which would be cognizable by an admiralty court between private persons, or whether that act is limited to suits *in rem.* The question arose upon exceptions to interrogatories annexed to the libel and designed to draw out the relation of the United States to the vessel; *i. e.,* whether there was a personal obligation of the United States from her failure to perform a contract of carriage.

Judge Learned Hand said:

> "I think that it is impossible to read the Suits in Admiralty Act (March 9, 1920), without concluding that Congress intended to provide for suits which are in the nature of in personam as well as in rem. In the first place, although the statute is drawn by persons entirely familiar with the usages and terms of the admiralty, Section 2 (Comp. St. Ann. Supp. 1923, Sec. 1251¼A), which confers the right, speaks, not of a libel in rem, which was the natural phrase if the respondent be right, but of 'a proceeding in admiralty.' Whenever such a proceeding 'could be maintained,' if the 'vessel were privately owned or operated,' 'a libel in personam may be brought.' The statute appears, therefore, to speak sub specie generale.
>
> "The history of the act strongly corroborates this conclusion, as will appear in a moment. Furthermore, even if Section 1 (Comp. St. Ann. Supp. 1923, Sec. 1251¼), which enacts that the remedy in personam is to be a substitute for the right given by the Act of 1916 to arrest United States ships, raises a doubt upon this interpretation, the later sections lay it. Thus in Section 3 (Comp. St. Ann. Supp. 1923,

Sec. 1251¼B) the libelant may elect to proceed with his libel as in rem, if there be a lien, though, of course, without arrest. What can such an election be, if he have only that right? This is not even left to implication, because his election is not to deprive him 'from seeking relief in personam in the same suit.' 'In personam' does not refer to the form of the libel, since that must be 'in personam' anyway, all arrests being forbidden. It seems hardly necessary to argue that it refers to relief which could be given in personam against a private person, and thus necessarily presupposes that such relief is open to any libelant in a proper case.

"Finally, section 6 (Comp. St. Ann. Supp. 1923, Sec. 1251 1/4e) grants the same 'exemptions' and 'limitations of liability' to the United States as to private owners. Allowing that 'exemptions' is an indefinite word, 'limitations of liability' can scarcely mean anything but the limitation which has been given to shipowners for 70 years. It applies necessarily to rights in personam, and, since the act is technically drafted, would have been quite meaningless, unless suits in personam had been understood to be included.

"The respondent's argument is plausible, based upon the main purpose of the act, i. e., to create a substitute for the earlier right of arrest, and this is reinforced by the reports of the legislative committees. However, there appears to me a conclusive answer to any such argument in the history of the Act in Congress. The original draft of section 2 read as follows: 'The United States * * * may be sued in personam * * * in those cases where, if the United States were suable as a private party, a suit in personam could be maintained, or where, if a vessel or cargo were privately owned and possessed, a libel in rem could be maintained and the vessel or

cargo could be arrested or attached at the commencement of the suit.'

"Thus it appears that the final form of section 2 —i. e., 'a proceeding in admiralty'—was a substitute for an express grant of jurisdiction as well over suits in personam as over suits in rem. Now it seems to me flatly impossible to suppose that, when Congress made the change from the enumeration of these two kinds of suits to a general phrase fitted to include both, it intended to cover only one of the two enumerated. Having shown its prior purpose specifically to include both, and having finally selected less cumbersome language naturally including both, how can it be argued that it meant to cover only one which it had shown that it knew how to express accurately when it chose?

"While the case is of first impression, so far as any judicial intimations have gone, they are in accord. Middleton & Co. *v.* U. S. (1921; D. C.), 273 F. 199, 200, 201; Blamberg Bros. *v.* U. S. (1921; D. C.), 272 F. 988, 979, affirmed by Supreme Court 1923 A. M. C. 50, 260 U. S. 452, 43 S. Ct. 179, 67 L. Ed. 346.

"The exceptions to the interrogatories are overruled; the other exceptions were disposed of at the argument."

The Isonomia (C. C. A., 2nd Cir., November 24, 1922), 285 Fed. 516, was a case in which the libelant elected to proceed in accordance with the principle of libels *in rem*, but in the course of the decision, which was written by Judge Rogers, it became necessary to ascertain whether or not if the *Isonomia* had been privately owned instead of being owned by the United States any suit against her would lie except in the district where she was found. The

Court held, therefore, that the proceeding *in rem* would fail, but at page 521 it most plainly indicated its opinion that if recovery had been sought in an action purely *in personam,* it would have been allowed.

Judge Rogers said at p. 521:

> "* * * The United States being everywhere within their territory, the libelant may sue in personam in the district where he resides and obtain jurisdiction of the respondent, or he may sue in rem where he finds the vessel without concerning himself with the whereabouts of the owner. But where there exists solely the liability of the vessel and no liability of the owner, the libelant must sue under the Act of 1920, as prior to the act, only in the district in which he finds the vessel.
>
> "We arrive at that conclusion, as we are convinced that the purpose of the act was to place the United States on exactly the same footing as a private party. That this was the intent appears from the language of section 2, declaring 'that in cases where, if such vessel were privately owned or operated,' a proceeding in admiralty could be maintained 'at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States,' provided the vessel was employed as a merchant vessel, etc. We understand this to mean that, where no right of action would exist between private parties, none would exist against the United States; and in the instant case it is admitted that, had the *Isonomia* been privately owned, instead of by the United States, no suit against her, on the cause of action alleged in the libel, would lie, except in the district where she was found.
>
> "The general language of the provision as to venue found in section 2, as of every part of the act

> of 1920, must be read in the light of the legislative intent so far as that intent is clearly expressed. Read in the light of that intent, we construe the provision giving permission to sue wherever libelant lives or has its principal place of business relates to those cases in which the proceeding is one which in its origin is essentially *in personam*, and that it does not extend to cases in which the proceeding is one which in its origin is essentially *in rem*, but in which the United States is made by virtue of the act suable *in personam*. * * *"

In *Grays Harbor Stevedoring Co.* v. *United States* (D. C. W. D. Wash. February 17, 1923) 286 Fed. 444, recovery was sought for stevedoring services furnished to two vessels owned by the United States, and the libelant elected to have the suits proceed in accordance with the principles of libels *in rem*. As these libels were defective, it was held by Cushman, D. J., that they might be amended to state a cause of action purely *in personam*.

In *The Anna E. Morse* (D. C. S. D. Ala. March 21, 1923) 287 Fed. 364, a libel was filed to recover sums of money which, it was claimed, were paid out by the libelant for the benefit of the vessel while she was loading in Mobile and which, it was claimed, created a lien upon the vessel. An exception was filed because the libel failed to allege that the vessel was within the jurisdiction of the Court. In a well considered and carefully reasoned opinion, Ervin, D. J., reached the same conclusion as this Court later reached in *The Quinnipiac*, 267 U. S. 122. He specifically declined to follow the limitations laid down in the *Isonomia* and, interpreting the Act with the same care as Benedict in his work on Admiralty, 5th edition, Sec. 194, and Judge Learned Hand, in *Agros Corporation* v. *United States*,

8 Fed. (2d) 84, came to the conclusion that the Act permitted suits purely *in personam*.

Judge Ervin said, at p. 366:

> "A careful reading of the act indicates that, while the primary purpose was to prohibit the seizure of the vessels and cargoes, Congress, when it gave the right to proceed in personam in lieu of the right of seizure, did not stop there, but also gave the right to proceed in personam against the government and such corporation, wherever such right would have existed against the owner had the vessel been privately owned. This intimation is found first in the words 'a proceeding in admiralty may be maintained,' etc., as found in the second section, instead of the words 'a seizure in admiralty could be had,' the words 'proceeding in admiralty' being much broader than the word 'seizure,' and the words 'a proceeding' certainly include a proceeding in personam as well as a proceeding in rem.
>
> "The fact that the right to proceed in personam against the government, where the right to proceed in personam against the owner of a vessel would have been had, had the vessel been privately owned, seems to be necessarily conceded by the following words found in the third section of the act:
>
> " 'If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit.' "

In *Thompson* v. *United States*, (D. C. S. D. Ala., May 16, 1923) 4 Fed. (2d) 412, Judge Ervin permitted a recovery

in this same case on the merits, but, on the facts, held that the libelant was entitled to a lien.

In *The Faraby* (Dist. Ct. S. D. N. Y. March 23, 1923) 1923 A. M. C. 468 (not reported elsewhere) a libel for salvage was brought against the United States but, since the vessel was not within the district under the Eighteenth Admiralty Rule, the libel for salvage was brought *in personam* against the United States as the person liable. It was held by Goddard, D. J., that such a libel would lie and the exceptions to it were overruled.

Judge Goddard said at p. 470:

> "* * * It cannot be the rule that a libel *in personam* only lies in case the vessel is within the borders of the United States, although the libel *in rem* does not lie unless she is within the waters of the district. The *Isonomia* means that in cases of libels *in personam* which would not between individuals require the presence of the vessel anyway, a libel may be filed in the district of the libellant's residence. The only escape from this result would be in case it were held that the Suits in Admiralty Act was intended to give no remedy except in cases where there was a maritime lien. The contrary was distinctly held in the *Isonomia* and is certainly not distinctly overruled in *Blamberg* vs. *U. S.*"

In *The Tug Nonpareil* (D. C. S. D. N. Y. December 27, 1923) 1924 A. M. C. 312 (not reported in the Federal Reporter) the United States was impleaded under the 56th Rule in Admiralty in a collision case. After the collision but before the suit was brought, the vessel was sold to foreigners, and the United States, appearing specially, moved to dismiss the impleading petition. It was held by Judge Ward that the United States might be impleaded, in accord-

ance with the general permission to sue it given by the Act, like any private party, and he held that since the owner of the vessel would be liable *in personam* for the collision, the impleading petition was good. In this suit recovery against the United States was permitted.

Judge Ward said at pp. 314-316:

> "I think the United States has consented to be sued either *in rem* or *in personam* where a vessel or a private owner could be sued, provided the vessel was owned or operated by the United States as a merchant vessel. * * *"
>
> "On the other hand if suit could be maintained against a privately owned vessel or against her owner, then the libellant has an election to proceed against the United States either in accordance with the principles of suits *in personam* or of suits *in rem*. * * *"
>
> "The first section of the Act prohibits the actual seizure of any vessel or cargo belonging to or in the possession or control of the United States or operated by or for the United States. The consideration, so to speak, for the prohibition is the consent of the United States to be sued *in personam*, as provided in sections 2 and 3 in respect to any vessel as to which a private owner or a vessel privately owned could be sued, provided it is employed as a merchant vessel by the United States.
>
> "It is a mistake to suppose that the Supreme Court in the case of *Blamberg* vs. *United States*, 260 U. S. 452, 1923 A. M. C. 50, or the Circuit Court of Appeals of this circuit in *The Isonomia*, 1923 A. M. C. 132, held that if a vessel which would be liable *in rem* if privately owned were not within the district no suit could be maintained against the United States *in personam*. In the Blamberg case the United States was under no personal liability whatever, because

the vessel in question was at the time the cause of action arose in the sole possession and control of the chartered owner and was at the time of suit brought in Havana and therefore a suit against the United States *in personam* could not be maintained. In the case of the *Isonomia,* the court held that a suit *in personam* could not be maintained for the reason that the libellant had sued because of a lien upon the vessel and had elected, in the language of the court, 'that this libel shall proceed in accordance with the principles of libels *in rem,*' and such a suit could be maintained only in the district court for the district 'in which the vessel or cargo charged with liability is found.' This was in strict accordance with the language of Mr. Justice Taft in the Blamberg case, viz., 'all we hold is that the district court was right in construing the second section of the Suits in Admiralty Act not to authorize a suit *in personam* against the United States as a substitute for a libel *in rem* when the United States vessel is not in a port of the United States or of one of her possessions.' " * * *

"* * * The purpose of the Act was to give libellants the same rights against vessels operated by the United States as merchant vessels that they would have against vessels privately owned and certainly the liability of the owner of a private vessel *in personam* would depend upon his ownership at the time the cause of action arose and it would make no difference who owned the vessel nor where she was when suit was brought. * * *"

In *The Castlewood* (D. J. E. D. Penn., April 10, 1924) 298 Fed. 184, a suit was brought to recover for repairs performed to the Steamship Castlewood. The libel contained two counts. Under the first, the libelant elected to proceed in accordance with the principles of suits *in rem,* and in

the second, to proceed *in personam,* as upon an account stated. Thompson, D. J., held that under the facts no lien would have arisen as between private parties, but he permitted a recovery *in personam.*

An appeal on the merits was taken to the Circuit Court of Appeals for the Third Circuit, 5 Fed. (2d) 1013, and the decision below was affirmed. The Government did not attempt to appeal on the jurisdictional question.

The Brush (D. C. N. D. Cal., December 15, 1925), 1926 A. M. C. 91 (not elsewhere reported), is somewhat similar in principle to the case at bar. Suits *in personam* were brought against the Government for failure to deliver cargo. The goods in each case originated in San Francisco and were to be carried to seaports on the Atlantic coast. They were not delivered at their destination, but were in fact, lost with the vessel, through an error of navigation upon the coast of Oregon.

It was expressly urged by the United States that it ought not to be held liable, since the Suits in Admiralty Act did not comprehend the principle of suits *in personam* when no lien against the vessel existed and where, accordingly, a suit *in rem* could not have been brought if the vessel had been privately owned. Kerrigan, D. J., squarely held that the libelant was entitled to decrees against the United States.

Judge Kerrigan said at p. 97:

> "After due consideration, I am inclined to agree with Judge Learned Hand, who in *Agros Corporation* vs. *United States,* 1923 A. M. C. 542, said, 'I think that it is impossible to read the Suits in Admiralty Act without concluding that Congress intended to provide for suits which are in the nature of *in personam* as well as *in rem.*' His views are in accord

with those of the author of the latest edition of Benedict on Admiralty, 5 Ed. Sec. 192, and seem to me to be well founded."

In the 5th edition of Benedict on Admiralty, the learned editor writes as follows in Section 194 in a passage which accurately analyzes the provision of the Suits in Admiralty Act:

> "The Act authorizes suit where, if the merchant vessel or Shipping Board tug were privately owned or operated or the cargo private owned or possessed, 'a proceeding in admiralty could be maintained at the time of the commencement of the action' provided for in the Act. The Act does not say 'where a libel *in rem* could be maintained' but reads 'a proceeding in admiralty,' a generic term embracing in its natural connotation actions *in rem* and actions *in personam*, both of which were separately specified in the original draft for which the final form of Sec. 2 has substituted a single but inclusive phrase. Equally clear is the implication of the provision in Sec. 3 that election to proceed upon the principles of libels *in rem* shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit. In safeguarding the right to relief *in personam* when conjoined with a claim on the principles of actions *in rem*, this clause necessarily contemplates that the right which such election is not to prejudice exists independently of that election. The provision of Sec. 6 that the United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to owners, etc., contemplates actions asserting a personal liability. The provision in Sec. 3 that suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice

obtaining in like cases between private parties and the further provision for an election to proceed in accordance with the principles of libels *in rem*, sufficiently show both from the contradistinction of phrase and from the inherent sense of an election that the Act is not confined to the application of the principles of libels *in rem* to the form of a proceeding *in personam*. It has been urged that the Act should be construed as merely affording a remedy *in personam* where suit might have been maintained *in rem* under Sec. 9 of the Act of September 7, 1916. But whereas the earlier Act clearly showed an intention not to create a liability of the United States *in personam*, the present Act not only substitutes a right of action *in personam* for one *in rem* but is replete with suggestions of rights *in personam* independent of any right *in rem* in cases of private ownership or under the Act of September 17, 1916. * * *"

It seems, therefore, perfectly clear that to contend, as was done in the Court below, on behalf of the appellee that the Suits in Admiralty Act does not allow the Government to be sued in tort would be to fly in the face of the very wording of the Act and in the face of the provisions of the rules of this Court hereinabove cited.

Proceedings in admiralty are permitted by the Act against the Government if the operation of the vessel in question as a merchant vessel was the occasion of the accident, or breach of contract.

Proceedings in admiralty may be based on maritime torts or on maritime contracts. There is not any distinction made in the Suits in Admiralty Act between tort and contract.

It should be noted in this connection that the Tucker Act of 1887, which created the Court of Claims and gave

concurrent jurisdiction to the District Court for small claims against the United States provided that the United States should be suable under that Act only for "cases not sounding in tort."

It is perfectly clear that if the Suits in Admiralty Act had intended to limit the Government to "cases not sounding in tort" they would have used the appropriate language often considered by the Federal Courts in connection with the Tucker Act.

An instance where the United States has been held liable for a maritime tort under the Suits in Admiralty Act is the following:

The Tug Nonpareil (D. C., S. D. N. Y., December 27, 1923), 1924 A. M. C. 312 (not reported in the Federal Reporter), was a case where the United States was impleaded under the 56th Rule in Admiralty in a collision case. After the collision but before the suit was brought, the vessel was sold to foreigners, and the United States, appearing specially, moved to dismiss the impleading petition. It was held by Judge Ward that the United States might be impleaded in accordance with the general permission to sue it given by the Act, like any private party and he held that since the owner of the vessel would be liable *in personam* for the collision, the impleading petition was good. In this suit recovery against the United States was permitted.

Thus the Suits in Admiralty Act does not impose on the United States any liability under which a private ship owner would not labor, but it does impose just the same liabilities.

For example, suppose that a vessel of the United States, employed as a merchant vessel, ran down and sank a

privately owned vessel and the private owner sued the United States for damages. If it should be found that the United States was privy to the fault, under the Suits in Admiralty Act, the full damages to the owner of the private vessel could be recovered. That seems to be perfectly clear by the wording of the statute. Otherwise, the United States would not be in the same position as the private owner in which the statute expressly placed it.

And so here, the United States is liable in full to the libelants because it is not in a position, owing to its personal fault in failing to mark the wreck, to claim any limitation of liability.

The Drill Boat No. 4, 233 Fed. 589.

Also, if the United States brings the first action in a collision case and there is a cross libel filed, as in several cases which have been before this Court, there is no question but that the United States is being held liable *in personam* for tort in the event it is held wholly or partly to blame.

It would seem, therefore, that the argument made on the Government's behalf below to the effect that the United States has not consented to be sued in tort was an argument that was raised purely for the benefit of the present case and if founded on anything was founded on a misreading of the decision in *The Western Maid* cases.

The Suits in Admiralty Act allows suits in admiralty for damages done by merchant vessels owned by the Government when used as such, but it does not extend the consent of the Government to be sued to torts committed by vessels engaged in governmental public service. That was what Mr. Justice Holmes referred to in his remarks in *The Western Maid* group of cases.

As we remember, Government counsel, below, in his argument emphasized the statement of Mr. Justice Holmes, reading it outside its context. That statement, we submit, will apply only to the acts of vessels in the public service of the United States employed in some *public governmental capacity.*

Indeed, to claim that the Suits in Admiralty Act did not allow the Government to be sued for tort would be to disregard not only the very wording of the Act, but its legislative history, which is to be found in Appendix I.

SECOND POINT.

A PRIVATE OWNER WOULD HAVE BEEN LIABLE TO THE LIBELANT FOR THE DAMAGES CAUSED BY HIS LEAVING THE WRECK OF *The Snug Harbor* UNBUOYED AND UNLIGHTED IN A FREQUENTED FAIRWAY.

I. AT COMMON-LAW THERE WAS AND IS A LIABILITY ON THE PART OF A WRECK SUNK IN NAVIGABLE CHANNELS AND ITS OWNER FOR DAMAGE CAUSED BY THE WRECK TO OTHER VESSELS UNLESS HE SHALL HAVE PROPERLY MARKED IT OR ABANDONED IT.

In both the United States and England, there seems to be recognized a general doctrine that where through an unavoidable accident, a vessel is sunk in navigable channels, the owner, if he abandons possession and control, is under no obligation to protect other vessels from receiving injury through such wreck but *before* he abandons such possession and control, "he is bound to exercise an ordinary and reasonable degree of diligence and dispatch either in removing it or in preventing its doing injury to others.

He is as much bound to use care in the control of his vessel while it is under water as while it is above water."

Shearman and Redfield on Negligence, 4th Ed. Vol. 2, Section 738.

In the United States there is a clear statutory duty which has been in effect since 1899. Act of March 3, 1899, Section 15, (30 Stat. 1152, C. 425). This section provides, that "whenever a vessel, raft, or craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do, shall be unlawful. * * *" There are a great many decisions before and since the date of this Act, covering the right of a vessel colliding with the wreck to hold the owners of the wreck for damages where the owner failed to properly mark the wreck.

It was stated by Ward, J., sitting in the Circuit Court of Appeals, Second Circuit, in 1915, in *The Plymouth*, 225 Fed. 483, in interpreting the above statute that:

> "Without any statute, the law lays this obligation upon every owner who does not abandon a wrecked vessel."

It would seem, therefore, that a case which was decided prior to the Act, holding an owner liable would be a recognition of the common law liability, as distinct from the statutory liability. In the case of *The Fred Schlesinger*, 71 Fed. 747 (N. D. N. Y. 1896), the Court held that the owners of a yacht, which had been sunken in eighteen feet of water

in a frequented channel, could not recover from a vessel colliding with the wreck for damage to the wreck hull on the grounds that the owners of the wreck were negligent in failing to indicate by sufficient signals the location of the wreck. Coxe, D. J., on page 748, said:

> "* * * Such a wreck directly in the track of passing vessels is a most dangerous menace to navigation. Regard for her own safety, as well as for the safety of others, should compel those responsible for her to make her presence known by plain and unmistakable signals. * * *"

The case of *The H. S. Nichols*, 53 Fed. 665, (1893) Southern District of New York, by Brown D. J., recognizes this principle.

The American courts all cite with approval and as authorities the leading English cases, dealing with this question, as do also our text books, 29 Cyc. 310.

There seems to be no English statute similar to ours. The Merchant Shipping Act of 1894, Section 530, which is apparently a re-enactment in part of the Removal of Wrecks Act, 1877 (40 and 41 Vict. C. 16, S. 4), provides that where any vessel is sunk, stranded or abandoned in any harbor or tidal water under the control of a harbor authority, in such manner as in the opinion of the authority may become a danger to navigation, that authority may light or buoy any such vessel or part until the raising, removal or destruction thereof. It would, therefore, seem that except insofar as this statute may apply, the law of England as laid down in the cases is the common law, and it is apparently well established and, in fact, does not seem to be disputed, that where the management and control of a wreck, so far as

relates to the protection of other vessels, has not been legitimately transferred by the owners, either they or the *res* are liable for a collision which occurs through insufficient lighting, buoying or other protection.

Brown vs. *Mallett* (1848) 5 C. B. 599;
White vs. *Crisp* (1854) 10 Exch. 312;
The Douglas (1882) 7 Prob. D. 151, C. A.;
The Utopia [1893] A. C. 492 P. C.;
The Snark [1900] Prob. D. 105, C. A.

These cases all recognize the principle to be well established and undisputed law that where the owner, who has not abandoned or transferred possession, is negligent in marking the wreck, he is liable in regard to the protection of other vessels. The law is stated by Lord Halsbury in Vol. 26 of The Laws of England, Shipping, Paragraph 533, as follows:

> "The owner of a ship sunk, whether by his default or not, if he abandon possession and control of her, has not any responsibility to light her so as to protect other vessels from a collision with her; but so long and so far as possession, management and control of the wreck be not abandoned or properly transferred, he is bound to take proper steps as regards lighting. In order to fix the owner with liability, it must be shown that, as regards lighting, the control of the vessel had not been abandoned or legitimately transferred, and that the owner has been negligent in the discharge of his legal duty."

In the case of *The Snark* [1900], Prob. D. 105, C. A., an owner who had hired a contractor to raise his sunken barge in the River Thames was held personally liable in damages

to a steamship which collided with the sunken barge on the grounds that the owner had not abandoned the wreck and was, therefore, liable for negligence whether it was the negligence of himself in not placing lights, or of someone whom he had hired to salvage the wreck. The court, by A. L. Smith, L. J., refers to *The Utopia* with approval, saying, at page 111—

> "* * * It is there in effect laid down that although it is in the power of the owner to abandon his sunken barge, and having nothing more to do with it, until he has done that he is under the ordinary liability of every other man. * * *"

The principle laid down in *The Utopia,* to which the court is referring here, is, in the words of the court, at page 498 of [1893] A. C.:

> "The result of these authorities may be thus expressed. The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shown, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned, or legitimately transferred, and, secondly, that they

have in the discharge of their legal duty been guilty of wilful misconduct or neglect."

The American cases are to the same effect both before and after the Act of 1899:

The Mary S. Lewis, 126 Fed. 848.
The Anna M. Fahy, 153 Fed. 866.
The Macy, 170 Fed. 930.
The Drill Boat No. 4, 233 Fed. 589.
The Fred Schlesinger, 71 Fed. 747.
The H. S. Nichols, 53 Fed. 665.

The Peoples Coal Co. v. *The Second Pool Coal Co.*, 181 Fed. 609 (D. C. Penn.), affirmed 188 Fed. 892. Orr, Judge, page 611, said:

"* * * Prior to the act of Congress, it was the duty of the owner of a sunken craft to put a buoy or light on it until it was abandoned. * * *"

Therefore the *Snug Harbor*, or her owner, if privately owned, would have been liable at common law for the libelant's loss in the absence of proof of abandonment.

II. THE COMMON-LAW LIABILITY ABOVE MENTIONED HAS BEEN FIXED AND EMPHASIZED BY THE STATUTE OF MARCH 3, 1899, AND THE DECISIONS THEREUNDER.

This statute is the Act of March 3, 1899, c. 425, Sec. 15 (Sec. 9920 of U. S. Comp. Stat. 1916), 30 Stat. L. 1152, c. 425, the pertinent portion of which reads as follows (italics ours):

"* * * And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, acci-

dentally or otherwise, *it shall be the duty* of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and the failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."

Sec. 19 of this same act provides for a period of 30 days before an abandonment is complete, unless legally established in a less space of time, and further provides that the Secretary of War may arrange for an earlier abandonment by publication of a notice for not less than 30 days, published in a newspaper near the locality of the wreck.

The full text of the Act of March 3, 1899, is annexed hereto as Appendix IV.

The leading cases holding that there is a duty to mark a wreck under this statute are as follows:

The Anna M. Fahy (1907) 153 Fed. 866, C. C. A. 2nd C.

The Macy (1909) 170 Fed. 930, C. C. A. 2nd C.

People's Coal Co. v. *Second Pool Coal Co.* (D. C. 1911) 181 Fed. 609. Affirmed 188 Fed. 892, C. C. A. 3rd C. Writ of certiorari denied 223 U. S. 727.

In 1915 the Circuit Court of Appeals for the 2nd Circuit reversed Judge Mayer in *The Plymouth* (District Court), 220 Fed. 348; (C. C. A.) 225 Fed. 483, and held that the owner of a vessel sunk in the Hudson River had complied with the section of the statute requiring it to mark the wreck by obtaining the services of the Lighthouse Department, which had official authority to do the same. (Res. March 2, 1868, Sec. 1—Sec. 8452, U. S. Comp. Stat, 15 Stat. 249.)

This reversal by the Circuit Court of Appeals for the 2nd Circuit was based on *The Douglas,* 7 Prob. 151 (1882). In *The Douglas* case it was held by the Court of Appeals that the common law liability of the owner to buoy a wreck was met by requesting the Harbor Master to care for the wreck. The Harbor Master promised to buoy the wreck but delayed, and a collision resulted. The owner of the wreck was held in no way responsible for the accident.

The Chambers (D. C. S. D. N. Y. 1924) 298 Fed. 194. The facts in this case do not make it clear precisely where the vessel was lost, but it was apparently in the neighborhood of South Amboy. A spar was painted red and sunk on the wreck with iron weights, but it carried away and therefore the wreck was not buoyed. It was held by Learned Hand, D. J., that the statute (Comp. Stat. Sec. 9920) imposed a continuous duty and that the owner must get frequent reports whether or not the buoy had carried away, and that he must show what prevented him, when it carried away, from substituting a new one. The statute, said Judge Learned Hand, is "drastic"; he held that the burden was on the owner to show why he did not watch the buoy.

"Either he must have done more, or have abandoned his rights, which would have cleared him." P. 195.*

III. THERE IS NO PRESUMPTION OF ABANDONMENT.

Abandonment cannot be presumed and there is no governmental duty until after the lapse of thirty days. The loss occurred twenty-nine days after the *Snug Harbor* was sunk.

In the *People's Coal Co.* v. *Second Pool Coal Co.*, 181 Fed. 609, affirmed 188 Fed. 892, certiorari denied 223 U. S. 727, Judge Orr held that failure to mark a sunken wreck is not a *prima facie* abandonment, and failure to remove does not amount to an abandonment until thirty days have elapsed or the Secretary of War has established a legal

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* A case almost exactly similar to the present one has already been decided against the United States Government.

The United States Navy scow No. 58 sank alongside of a berth in the Wallabout Channel at the Brooklyn Navy Yard. In lieu of a buoy a coffee can was moored at the outboard edge of the scow, but in spite of this the tug *E. M. Millard* collided with the wreck and sank.

Since the scow was a public vessel a special Act of Congress was necessary to permit suit to be brought, and this was obtained. 41 Stat. 1553, Chap. 144.

The litigation is reported as *The E. M. Millard* (D. C., E. D., N. Y., December 22, 1922), 285 Fed. 94. The decision precisely supports the contention here made, for recovery was granted under the Wreck Act of March 3, 1899, Sec. 15, Judge Garvin holding that the coffee can was an insufficient buoy.

It is a mute but eloquent fact that the Government, which appeals all but the clearest cases, did not appeal this case.

abandonment as provided by law. He discusses this question as follows, at pages 611-612:

> "* * * In this case abandonment is emphasized by the following quotation from Shearman & Redfield on the Law of Negligence, Sec. 583:
>
> " 'If, however, instead of abandoning such wreck, he retains such possession and control of it as it is susceptible of, he is bound to exercise an ordinary and reasonable degree of diligence in removing it or preventing it doing injury to others.'
>
> "It was urged on behalf of respondent that, because respondent had neglected its duty to mark the place of the sunken vessel and to immediately commence the removal of the same from the river's channel, that of itself constituted an abandonment, and therefore there is no responsibility. To hold this would permit the respondent to take advantage of its own wrong. The neglect to mark the sunken craft was no prima facie abandonment, and failure to remove was not abandonment until a period of 30 days had elapsed, or the Secretary of War had established the legal abandonment of the vessel within the statutory period. There is no evidence in this case that the Secretary of War had taken any steps to declare the abandonment of the vessel within 30 days, and therefore the respondent had all of 30 days to remove same before the sunken craft could be considered as having been abandoned. This seems to me to be a reasonable construction of the language of the act. * * *"

In *The Mary S. Lewis*, 126 Fed. 848, the Court said at page 849:

> "* * * Growing out of, and in connection with, these questions, is one vital, essential, and controlling

> inquiry, which, when answered, practically disposes of the serious contention, and this is the question: In the circumstances, was the place of the wreck properly marked or designated by warning buoys, beacons, or by any other means, so that mariners in the harbor should have been put on guard, and have had reason for avoiding the dangerous spot?"

The Circuit Court of Appeals for the Second Circuit said in *The Macy,* 170 Fed. 930:

> "This statute was before us in The Anna M. Fahy, 153 Fed. 866, where it was held that the duty of marking the location of the wreck was placed by the statute upon the owner, and no one else, and that there is no divided responsibility. It was further held that when the owner of a sunken wreck has neglected to comply with the statute, and by reason of the absence of buoy, beacon, or mark of any kind, a vessel herself free from fault has sustained damages by collision with the wreck, recovery therefor may be had against the colliding vessel. * * *"

In *The Anna M. Fahy,* 153 Fed. 866, the Circuit Court of Appeals for the Second Circuit said:

> "The libel was filed upon the theory that the Fahy was solely liable for the reason that her owner neglected to comply with the provisions of Section 15 of the Act of March 3, 1899, which directs that it shall be the duty of an owner of a vessel sunk in a navigable channel immediately to mark it with a buoy or beacon during the day and a lighted lantern at night. * * *
>
> "The duty thus made imperative was wholly neglected. From the sinking of the Fahy to the collision with the Bulley nearly ten hours elapsed

and no buoy or beacon, or mark of any kind, had appeared above the wreck. This failure to act, imperilling as it did the lives and property of those navigating a much frequented channel, is made unlawful by the statute and was negligence of a pronounced type. * * *

"* * * The law placed the duty of marking the wreck upon him and he cannot escape responsibility by delegating it to others. * * *

"The statute places the duty to mark upon the owner and no one else; there is no divided responsibility and, if the statute is to be effectual, there cannot be. * * *

"We do not intend to hold that conditions may not arise where a duty is imposed upon a tug to mark a wreck caused by her negligence. * * * [It is] where communication with [the owner] is impossible from any cause, that a duty rests upon the tug to mark the wreck. No such situation arises in the case at bar. There was nothing whatever to prevent the owner from marking the wreck; the tugs knew this and were justified in assuming the owner would act as he was commanded to act by law."

The rule is thus stated in 1 C. J., pp. 5-6:

Abandonment is "the giving up of a thing absolutely, without reference to any particular person or purpose. * * *"

Abandonment "includes both the intention to abandon and the external act by which the intention is carried into effect.

"To constitute abandonment in respect of property, there must be a concurrence of the intention to abandon and an actual relinquishment of the property, so that it may be appropriated by the next comer."

In *The Drill Boat No. 4,* 233 Fed. 589, it is said at page 594:

> "Their [the crew's] employment did not terminate when their vessel sank. 'The duty of the seamen continues on these melancholy occurrences as long as they can be useful in preserving the property at risk and gathering up its fragments.' Story, J., *The Two Catherines,* Fed. Cas. No. 14,288. See, too, *The Massasoit,* 1 Sprague, 97, Fed. Cas. 9,260. * * *"
>
> "* * * The danger of further injury to the drill boat from collision with other vessels was great; it was in fact seriously damaged by the Massachusetts. It was clearly the duty of its crew to use reasonable care and diligence to protect it against such damage, and in connection therewith to warn other vessels against colliding with it. This they failed to do, and there were not overweighing considerations —e. g., of personal safety—which justified them in disregarding those duties. I therefore hold that the petitioner was personally at fault for the unseaworthy condition of drill boat No. 4, due to its being improperly manned, and that to this fault is attributable the failure of the crew to warn the Massachusetts, by marker or otherwise, of the existence of the wreck."

In the present case the allegations of the libel must be taken as admitted both by the Government's suggestion or by the exceptions.

In the libel, by the amendment allowed at the argument, it is alleged, in Article 6,—

> "that up to the time hereinafter mentioned notice had not been given or published advising mariners navigating the waters in which the *Snug Harbor* had sunk, of the presence of the wreck."

The only two governmental acts which the United States could have performed concerning the wreck during the period of thirty days under the statute would have been (1) to have taken charge of the wreck and destroyed it in case there had been any actual abandonment of the wreck by the Shipping Board to the Government, or else (2) in the exercise of its governmental function for the safety of mariners to have given notice of the presence of the wreck and its location so that mariners navigating those waters would have understood that there was a wreck there and where they should go to avoid it.

The Government did not give any such notice and, as there cannot be any presumption of abandonment, the situation is one where the Government as owner has not made out an abandonment and there are not any facts from which an abandonment can be assumed by the exercise of any *governmental function* with regard to the wreck.

IV. THE WRECK OF *The Snug Harbor* LAY IN A FREQUENTED FAIRWAY WITHIN WATERS OVER WHICH BOTH THE DISTRICT COURTS FOR THE SOUTHERN AND THE EASTERN DISTRICTS OF NEW YORK HAVE CONCURRENT JURISDICTION.

The place of the wreck of the *Snug Harbor,* as stated in the libel, which must be taken to be admitted owing to the way in which this case comes before the Court, is as follows:

> "About 4¼ miles East by North of Montauk Light in a frequented channel way within the harbor and inland waters."

Thus, the accident happened at a place which is within the inland waters of the United States as defined by the Secretary of Commerce. These are laid down in the Navi-

gation Laws of the United States, 1923 ed., at page 288 as follows (italics ours):

> "Nantucket Sound, *Vineyard Sound,* Buzzards Bay, Narragansett Bay, Block Island Sound, and easterly entrance to Long Island Sound: A line drawn from Chatham Lighthouse, Mass., 154° (S. by E.), 6½ miles, to Pollock Rip Slue Light Vessel; thence 137° (SSE ½ E.), 11 miles, to Great Round Shoal Entrance Gas and Whistling Buoy (PS.); thence 229° (SW. by W. ⅝ W.), 14½ miles, to Sankaty Head Lighthouse; from Smith Point, Nantucket Island, 261° (W. ⅜ N.), 27 miles, to No Mans Land Gas and Whistling Buoy, 2; thence 359° (N. by E. ⅛ E.), 8⅛ miles to Gay Head Lighthouse; thence 250° (W. ⅝ S.) 34½ miles, to Block Island Southeast Lighthouse; *thence 250½° (W. ⅝ S.), 14¾ miles, to Montauk Point Lighthouse, on the easterly end of Long Island, N. Y.*"

In *The Persian* and *The Hesperides,* 181 Fed. 439, Pollock Rip Slue at the mouth of Vineyard Sound, which is referred to in the above quotation, was treated as a narrow channel in respect to anchorage, by the Circuit Court of Appeals for the Second Circuit. The principle laid down in that case is controlling in this. The syllabus is as follows:

> "A collision occurred at night in a dense fog off the Massachusetts coast a short distance to the north of the northern entrance to Pollock Rip Slue between the steamship *Persian* going northward and the steamship *Hesperides,* which had anchored on account of the fog. The fairway for deep-draft vessels navigating up and down this part of the coast lies for miles through dangerous shoals and has been charted and marked by the Government by lightships and buoys. From the Pollock Rip Shoals Lightship,

which was a half mile or more to the northward of the place of collision, the range is straight to the southward through the slue for four and one-half miles to the Pollock Rip Lightship, marked at intervals of one and one-half miles by Whistling Buoy No. 2 and Bell Buoy No. 1, and the preponderance of evidence showed that the *Hesperides* was anchored directly in this range, which vessel in a fog follow by compass between the two lightships. The *Persian* stopped on hearing the fog bell of the *Hesperides,* but on seeing a light on the starboard bow the master assumed that it was on a small vessel, starboarded the helm, and proceeded at greater speed directly toward the *Hesperides,* whose stern light was then seen on the port bow, but too late to avoid collision. Held, that the *Hesperides* was in fault for anchoring in the dense fog in the fairway, which was constantly used by other vessels when there was open sea to the east of her; that the *Persian* was also in fault for not navigating with greater caution after hearing the fog bell of the other vessel."

The wreck lay within waters over which the District Courts of the United States for the Southern and Eastern Districts of New York have concurrent jurisdiction.

The Judicial Code, Section 97, delimits the judicial districts in the State of New York and constitutes four such districts.

The provisions regarding the Southern and Eastern Districts are as follows:

> "The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Richmond, Kings, Queens, Nassau, and Suffolk, with the waters thereof. Terms of the district court for said district shall be held at Brooklyn on the first Wednesday in every month.

> The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof. Terms of the district court for said district shall be held at New York City on the first Tuesday in each month. The district courts of the southern and eastern districts shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; all processes or orders issued within either of said courts or by any judge thereof shall run and be executed in any part of said waters."

The result of this location of the wreck is that a proceeding *in rem* could have been brought against the wreck in the Southern or Eastern districts of New York if the wreck had been privately owned.

The Macy, 170 Fed. 930 (C. C. A., 2nd Cir.)
The Douglas, (1882) 7 Prob. Div. 151 (C. A.)

Furthermore, a private owner of the wreck who had allowed the wreck to go unmarked and had caused the dis aster claimed for in these libels, would not be able to invoke the limitation of liability statutes because of the fact that his failure to mark the wreck would make him privy to the accident within the meaning of the statute and preclude his claiming its exemptions. It would be a failure in a personal duty imposed on him by the law.

The Drill Boat No. 4. 233 Fed. 589.

LAST POINT.

THE APPEAL HEREIN SHOULD BE ALLOWED AND THE DECREE BELOW REVERSED WITH INSTRUCTIONS TO PROCEED WITH PLENARY TRIAL OF THE SUIT.

To summarize, this is the situation in this case:

We have a statute giving a right to sue the United States by an admiralty proceeding *in personam* with the option in the libelant, if he so elects in his libel, that

> "the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained."

And further provided elections so to proceed shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit.

At the commencement of Section 3 it is further provided:

> "That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

That is all that the libelants ask in this case.

If the question of jurisdiction *in rem* be regarded as important, the cases hereinbefore cited indicate (1) that the wreck is liable *in rem*, (2) that the wreck of the *Snug Harbor* was within the jurisdiction of the District Court of the United States and would be subject to be sued *in rem*

and, hence, the objection taken in the *Blamberg* case could not be taken in the present case.

It would seem, therefore, that every requisite to founding the jurisdiction in the present case exists.

We have the consent of the Government to be sued.

We have the presence of the wreck within the jurisdiction of the United States, if that be essential.

We have a situation in which a private owner would have been liable if the *Snug Harbor* had been owned by a private owner, and

We have the *Snug Harbor* used as a merchant vessel when she was sunk.

It seems, therefore, that there can be no escape from the fact that the Court below erred in dismissing the libel on jurisdictional grounds.

Respectfully submitted,

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Norfolk, Virginia, April, 1926.